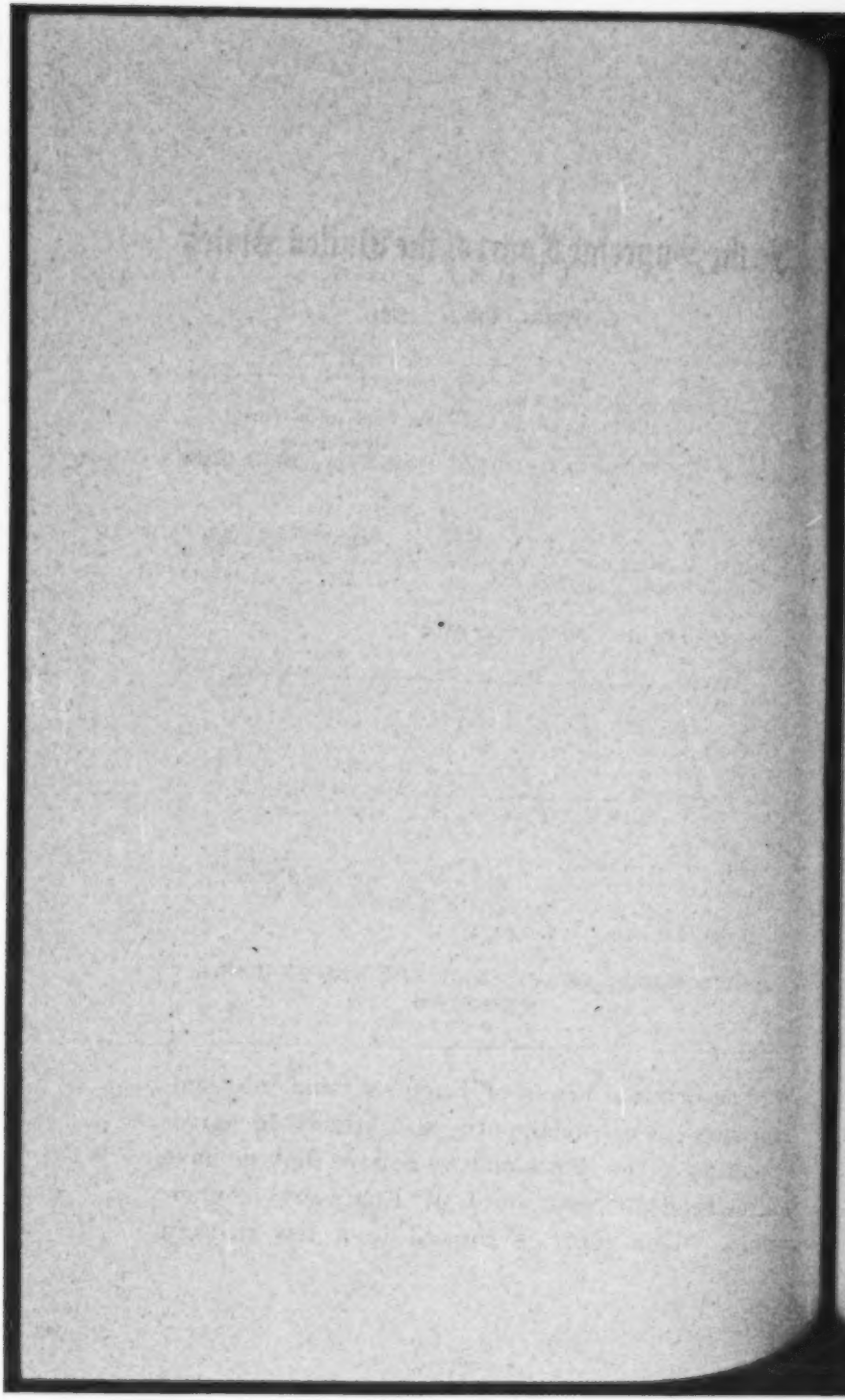
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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 2

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

ENGINEERS PUBLIC SERVICE COMPANY ET AL.

No. 3

ENGINEERS PUBLIC SERVICE COMPANY ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

The original briefs of Engineers and the Commission, filed concurrently, are largely in agreement as to the issues and we believe that we have already dealt with most of Engineers' contentions. This reply is limited to a few matters

concerning which our main brief may not be adequately responsive to Engineers' arguments.

1. Choice of System

Engineers argues that the Commission's orders are unlawful insofar as they purport to control Engineers' choice of its single system. Their position is that while the Commission is granted power to limit its operations to a single system, it has no power to say which one of the several systems under Engineers' control shall be retained and which shall be disposed of. The argument is based upon the assumption that there are no standards to govern the choice and that consequently if the Commission is given the power to choose, even in default of a choice by Engineers, the statute is void for undue delegation of power to the Commission (see Engineers' Br., pp. 86–91). This argument ignores both the existence of specific statutory standards and the nature of the problem of choosing a single system.

The Act in Section 11 (b) (1) directs the Commission "as soon as practicable after January 1, 1938", "to require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility sys-

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tem * * *" and other retainable systems and other businesses. The statute affords the holding company an opportunity to be heard, but it does not place with the company the choice of what action the Commission shall order, nor does it say that the Commission shall determine all possible courses of action which might conceivably result in compliance, and then enter an order in alternative form which could be complied with by taking any one such course. In terms it is left to the Commission to determine the action which it shall find necessary. Thus it is only by implication from the Act's concern for investors' interests and because of the company's prima facie standing to speak for the interest of its stockholders that the company's views as to the choice of the single integrated system become relevant. Implications from the over-all objectives of the Act do not, however, extend to making the company's choice either conclusive or a prerequisite to the entry of an order prescribing the action to be taken.

The practical reasons for designating one system rather than entering an alternative order are obvious. The purpose of a Section 11 (b) order is to implement the statutory mandate for limitation by a more specific prescription of what is to be done, and to do so in an order which in default of voluntary compliance will be susceptible of court enforcement. See our brief in the *American*

and *Electric* cases, Nos. 6 and 7, pp. 99–100. Engineers argues (Br., p. 91) that the provision of Section 11 (c) under which it is given a full year for compliance means that it must have a full year to choose which system it will keep, and that this requires an alternative order. But this argument overlooks the statutory mandate that the Commission specify the action to be taken. Moreover, if compliance is not had, the order must be readily enforceable under Section 11 (d). If the order is in the alternative, Engineers may well argue that the enforcement court has no right to dispose of any specific one of its properties since no standard is prescribed in the Act for the court to make the choice. It could urge that the enforcement court, like the Commission, must wait until Engineers sees fit to agree to its order. Thus Engineers' argument in its full reach makes the statute completely unenforceable, and in its narrowest compass would defer to the enforcement court a decision which Congress obviously intended should be made by the Commission, subject, of course, to review under Section 24 (a).

In fact, the question of which subsidiary company is to be retained by Engineers as its single system, and which subsidiary companies are to be disposed of by distribution to security holders of Engineers or by sale, is largely a matter of mechanics and procedure. Section 11 (b) (1) of the Act, if we have construed and applied it correctly,

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provides merely that only one integrated public utility system now controlled by Engineers can be controlled through a single holding company. The Commission's order deals with Engineers as a corporate entity and designates the properties which Engineers must divest. The ultimate test of the reasonableness of the order and of the statutory provisions depends, however, upon the effect on Engineers' investors (except, of course, as their interests may be limited by paramount public interest). In considering the effect on Engineers' investors it should be noted that the order does not preclude stockholders of Engineers from retaining an interest in two or more of the integrated systems. If, for example, Engineers' capitalization consisted of a single class of stock, compliance with the divestment order might involve, in the main, distributing as partial liquidating dividends the stock in subsidiaries which would continue to operate the El Paso and Gulf electric systems. The fact that Engineers has preferred as well as common stock means that fair and equitable provisions for the preferred stock must be made. A fair and equitable resolution of this problem might take a variety of forms, including: (1) A determination of the respective interests of Engineers' preferred and common stockholders in its assets and an allocation to them, in accordance with such determination, of interests in each integrated system in the form of either

direct interests in operating company common stock or interests in one or more holding companies having permissible holdings of operating company common stocks;[1] (2) A sale by Engineers of the properties ordered divested and application of the proceeds in retirement or reduction of its preferred stock, followed by distribution to common stockholders as liquidating dividends of any other operating company stocks which may require divestment; (3) Engineers' current proposal. See Holding Company Act Release No. 6131, *cf.* our main brief pp. 21, 22. This proposal, applicable in the event the Commission's order is sustained, is to permit common stockholders to purchase Gulf and apply the proceeds to the retirement of the preferred stock. Thereafter, it is proposed that Engineers will either be dissolved or merged with Virginia.[2] Considering this

[1] See, for example, the plan of Commonwealth and Southern Corp. to comply with an order requiring a one-stock capitalization and to comply in part with Section 11 (b) (1) of the Act. Under this plan Commonwealth's preferred and common stockholders receive the same proportionate interests in certain northern subsidiaries which are thereby divested and in Commonwealth and Southern reduced to a single class of stock and continuing to hold its southern subsidiaries pending determination whether these are retainable under Section 11 (b) (1). This plan has been approved by the Commission but has not yet been enforced. See Holding Company Act Releases Nos. 5825, 5895, cf. Release No. 6177.

[2] While the plan does not so state, it is our assumption that Engineers would want to continue in existence as a holding company over Virginia only if tax advantages resulted; that these tax advantages derive solely from the fact that for

aspect of the Commission's order as purely a procedural matter, which in fact it is, the Commission was clearly warranted, absent any contrary showing or even an indication of preference by Engineers, in treating the Virginia Electric system as the single system which Engineers might retain, and ordering divestment of property which did not meet the standards of Section 11 (b) for retention with Virginia.

The Commission's position involves no unlawful delegation of legislative power. The standards set forth in Section 11 (b), *supra*, pp. 2–3, are specific. The statute directs the taking of "such action as the Commission shall find necessary" to "limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system." It also specifies the time when the action shall be taken, namely, "as soon as practicable after January 1, 1938." The Commission is, of course, given discretion to determine what action is necessary to achieve the prescribed objective, but even in that narrow area the Commission is given adequate guides. For in determining what action is

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the purpose of computing excess profits taxes Engineers has the advantage of a higher invested capital than Virginia and that this may be used in reducing Virginia's excess profits taxes through filing a consolidated return. Repeal of the excess profits tax would seem to make this irrelevant and it may be that even if the excess profits tax were continued the same tax advantage could be obtained through the merger.

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"necessary" under the Act the Commission must bear in mind that Section 1 (c) declares a policy in "accordance with which policy all the provisions of this title shall be interpreted * * *" and that that policy is to meet the problems and eliminate the evils as enumerated in Section 1 of the Act. Those evils are specified in detail in Section 1 (b). Thus, the standards to which the Commission must conform in all its actions under Section 11 (b) (1) are clearly set forth. For example, if the choice of one system rather than another will result in "lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital" (Sec. 1 (b) (5)), or otherwise result in any of the evils enumerated in Section 1 (b), the Commission would, of course, be required to order limitation of the system in a manner which would avoid those difficulties.[8] But in

[8] Sections 11 (d) and (e) indicate that plans of compliance with Section 11 (b) must be "fair and equitable," a standard which, of course, includes consideration of the interests of investors. See also the standards of Sections 7, 10, and 12 insofar as applicable to security issues, acquisitions, dispositions or other transactions which may be included in any plan for compliance. It is particularly at the compliance stage that the Commission must give close consideration to the relative advantage to investors of alternative methods of carrying out an order. These considerations would, of course, be pertinent also in determining what action shall be ordered pursuant to Section 11 (b) insofar as investors might

this case there is no showing that the order violates any of the statutory standards, and the contrary is true.[4] As the standards contained in the statute are clear and specific regarding the objective to be obtained and the timing of such objective, there is no valid basis for objection because the methods of achieving the statutory objective are left to the Commission under more general standards relating to the interest of investors, consumers and the general public. See *Yakus* v. *United States*, 321 U. S. 414, 425–426:

> It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. * * * Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of

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be concerned with which integrated system should be designated as the single system. As we pointed out in our main brief, there was every indication that if Engineers were to continue as a holding company it would be preferable from the point of view of its investors to keep Virginia rather than Gulf as a subsidiary. (Br., pp. 120–123.) As we show below, Engineers' own plan indicates that if Engineers cannot keep both Virginia and Gulf as subsidiaries the management sees no present advantage to keeping the holding company at all.

[4] See our original brief, pp. 120–123.

> courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will. * * * Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.[5]

In practice, the Commission has always endeavored to ascertain the views of respondent holding companies concerning their choice of a single system and has never rejected an indicated choice. In the instant case, as well as in the North American case, the Commission was confronted with a situation where the holding company apparently from considerations of legal strategy refused to make a choice. Under such circumstances it can hardly be considered arbitrary for

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[5] In the *Yakus* case the Court upheld a delegation of power to the Price Administrator to consider "such relevant factors" in the fixing of maximum prices "as he may determine and deem to be of general applicability," including but not limited to certain enumerated factors. 321 U. S. at 421. Similarly, in *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 136, 143–146, the Court upheld a Congressional directive that the agency must consider certain named and unnamed "relevant factors" in determining minimum wage rates.

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the Commission, upon failure of the company to do so, to have itself indicated the choice and thereby limited Engineers to the particular system which at the time of the order appeared most suitable for retention.

The fairness of this procedure is emphasized by the fact that the next-to-last sentence of Section 11 (b) permits modification of the order if the single system which had served as a point of reference for the order requiring divestment of other properties should itself be divested. In that event "the conditions upon which the order was predicated" would no longer exist.*

2. The Construction of Clause (B)

Engineers attempts to bolster its construction of Clause (B) by reference to the legislative history. From the conceded fact that the Act was intended as a compromise between the Senate and

* Engineers makes some point of the fact that in the event it should desire to retain Gulf instead of Virginia, it could not automatically secure a revision of the order but would have to make a showing of the reasons for such a change and obtain the Commission's approval. (Br., p. 85.) But were it otherwise the order would be subject to abuse. The absolute right at any time to secure a new order based on the retention of Gulf without an actual disposition of Virginia, or at the very least a bona fide proposal to do so, would give Engineers a ground for contending that the new order granted an additional year for compliance at the end of which it might decide to obtain another order based again on Virginia, or perhaps on El Paso. And so on *ad infinitum*.

House bills, Engineers argues that the one-area construction of the Commission gives the Act the same effect as the Senate bill and gives no concession to the views of the House. This ignores the fact that the Senate wanted all holding companies to be abolished unless they obtained special permission from the Federal Power Commission, which could be granted only on specifically defined conditions, whereas the House wanted to permit a holding company to hold a single integrated system without such permission and also to hold such other systems as might be approved by the Securities and Exchange Commission. Clearly in this context it was a concession to agree with the House that a single system might be retained without permission of any Federal Commission and to permit the retention of additional systems on approval by the Commission but under specified standards limiting such additional systems to the same area and requiring the relationships to the single system indicated in Clauses (A) and (C). Emphasis is placed on the statement by the President that the Act was a "generous concession" on the part of the Senate conferees (Br. p. 101). But Senator Wheeler, also, termed the conference substitute "a generous concession on the part of the Senate" (See p. 68 of our main brief quoting 79 Cong. Rec. 14479, Aug. 24, 1935). Yet this remark was made in the very speech which contains what Engineers agrees to be "a

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clear expression of the one-area view" (Br. p. 107). The coincidence of views of the President and Senator Wheeler in favoring the Senate bill (see Eng. Br. p. 101) and regarding the conference substitute as a generous concession suggests rather than controverts a similar agreement on the one-area view of the conference language. Certainly it destroys any basis for Engineers' argument (Br. p. 102) that "The President obviously did not attribute a one-area interpretation to Clause (B) since if he had done so he could not properly have referred to the substitute bill as a 'most generous concession on the part of the Senate conferees.'" Indeed had the concession of the Senate been as generous as petitioners urge, there would be serious question whether anything was left to the Senate by the compromise.

Attempts have also been made to read unwarranted significance into selected portions of the legislative history. For example, reference is made (see Br. p. 98–99, footnote 26) to the testimony before the House Committee of Mr. Harriman, president of the Chamber of Commerce, who is alleged to have suggested a two-region compromise. However, we have been unable to find anywhere in the legislative history the slightest indication that the Harriman suggestion was taken seriously by either the committee before which it was made or by any member of the House

or Senate concerned with the passage of the Act.[1] Indeed, the whole focus of discussion was not in terms of areas but on the number of systems that might be retained. There is thus no basis whatever for Engineers' assertion (Br. p. 98-99, fn. 26) that the "Harriman proposal was *unquestionably* the origin of the two-region compromise which was ultimately adopted by the Senate, with certain refinements, on August 24, 1935." (Italics supplied.)

Similarly (at p. 102) reference is made to the fact that the conference committee changed Section 1 (c) of the Senate bill from a form which referred to the elimination of "properties not economically and geographically related in operations" and inserted reference to elimination of "properties detrimental to the proper functioning of such systems." The insertion of the new language was apparently regarded as of little significance since no mention of it was made in the conference report where it first appeared (see H. Rep. No. 1903, 74th Cong., 1st Sess., p. 65). In any event, both the House and the Senate bill clearly indicated that relation to operations was

[1] There is in fact no evidence that any attention was paid to Mr. Harriman's remarks except for a passing mention in Mr. Corcoran's testimony before the Senate Committee, Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., p. 202). The index to Vol. 79 of the Congressional Record covering the period in question fails to reveal that any mention was made of Mr. Harriman's name.

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important since before the conference as well as after, they both contained Section 1 (b) (4) reciting among the evils to be eliminated the growth and extension of holding companies bearing no relation to ". . . the integration and coordination of related operating properties."

Reference is also made (Eng. Br. pp. 103–104) to the paragraph in the Conference Committee report which states that Section (B) provides that "all such additional systems are located in a restricted area." We do not rely on that passage since it would not be clear from this paragraph alone whether the words "restricted area" were intended to have reference to a restriction with relation to the single system or to some other restriction such as the one for which Engineers contends. Rather, we find support for our position in the later passage of the conference report quoted at pp. 64–66 of our original brief. We do, however, wish to indicate that Speaker Rayburn's discussion on the floor of the House (mentioned at p. 100 of petitioners' brief) contained an exact paraphrase of the earlier passage in the conference report and that the reference was to a "restricted area" and at no place did he mention "restricted areas" (as stated at p. 100 of petitioners' brief).[8]

[8] The plural form in petitioners' brief is no doubt inadvertent, but its significance is such as to require us to point out the error.

One further comment is indicated. In discussing what it terms the irrational consequences of the Commission's construction (Br. pp. 112–113), the brief of petitioners refers to the fact that in certain areas Clause (B) would leave much larger permissible combinations than in others. This is not a legitimate argument against the Commission's construction of Clause (B) since that clause is a rule of thumb for initial limitation, and further limitation is to be accomplished by the application of Clauses (A) and (C). See, for example, the discussion of the court below with respect to Savannah, held retainable under (B) with Virginia but ordered to be divested by reason of the operation of (A) and (C). (R. 1216, cf. 106–115.)

3. The Retainability of the Gas Business

Engineers' brief emphasizes the evidence submitted by its officers as to increased expenses of separate operation of the gas and the electric business. It speaks of "proved and admitted economies of combined operation" (Br. p. 123) and declares the increased expenses on separation "a tangible fact which can be established with practical certainty" (Br. p. 125). These expenses incident to the creation of separate establishments it states "may be easily visualized" (Br. p. 124) and that "reasonably definite estimates may be made as to the costs of independent operations" (Br. p. 124). This analysis fails to take into

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account that the "proved" "definite" "tangible" facts reflected merely the statements of interested officers and employees of Engineers as to what in their opinion the future situation would be in the event of separation. This was nothing more than a guess by interested parties designed to sustain the retention of the gas business. The testimony was no less conjectural because it was reduced to computations carried with illusory precision to the last dollar.[9] Furthermore, Engineers' brief fails to take into account the demonstrated unreliability of that testimony, which far from being reasonably definite was so vulnerable that on the basis of cross examination alone the Commission was in a position definitely to reject at least 50% of the amount of the estimates.[10]

Furthermore, Engineers argues now (Br. p. 125) that the effect on the gas system of freedom to compete is not "predictable at all" and presumably must be ignored completely in con-

[9] For example, it was stated that increased expenses of customers' accounting and collection would be $18,592. Such precision should presumably have produced some computation of the benefits of obvious savings on separation, such as the elimination of the necessity for constant allocations between the companies and for allocation studies.

[10] For example, the petitioners' estimates for billing and accounting work for gas customers alone turned out to be more than the present cost for billing the same number of customers for both gas and electricity, to the confusion of petitioners' witness when called upon to explain the discrepancy (R. 1167-71). In various other respects simple comparisons to existing expenses showed little weight could be given to the "tangible facts" presented by the company's

sidering whether substantial economies will be lost by separate operation. That an element so important to the future operations of the gas company must be ignored under its thesis indicates clearly the deficiencies of Engineers' arguments. For counsel's arguments are of a piece with the opinion testimony of the officials of Engineers—they can be explained only as based on the economic philosophy that there is no advantage to independence and freedom to compete and that it is desirable to have indefinite extension of control over different kinds of companies under a single management. Whatever may be the merits of that philosophy it was rejected by the Congress in adopting the present Act. When viewed in the light of the economic philosophy of the Act rather than the contrary philosophy upon which petitioners' contentions are based, it is clear that the Commission's view of the Act and its

witnesses. See the discussion in the Commission's opinion (R. 104–05). Similar predictions of disastrous financial results of separation which could be avoided on retention were made by Engineers' officials with respect to the transportation properties of Virginia and El Paso. See Commission opinion (R. 92–96), and the opinion of the court below (see R. 1228). For example, the Virginia transportation properties, it was testified, would be worth $5,000,000 more to Virginia than to a purchaser, the assumption being that Virginia could obtain a realization of $8,000,000 whereas no one else would pay more than $2,000,000 (R. 94–96). Yet when the order of the court below freed Engineers from the compulsion to dispose of those properties, their business judgment belied their testimony and they voluntarily disposed of the traction properties.

conclusion from the facts in this case must be sustained."

Engineers (Br. pp. 120–123) attacks the Commission's statement that it could approve the retention of the gas properties only on the showing of such loss of economies as might seriously impair the operations of the systems involved. Our main brief, pp. 76–81, shows that this was in fact the standard Congress adopted. Indeed the relationship of dependence required for retention is particularly clear in the case of gas properties because the definition of a single integrated system in Section 2 (a) (29) (B) applicable to gas properties substantially overlaps the standards of the (A) and (C) clauses of Section 11 (b) (1), as they apply to additional systems. Thus it is clear that Congress intended the relationship between a single system and an additional system should be comparable to that between parts of

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[11] Engineers also argues that Sections 8 and 9 of the Act give it the right to acquire gas properties without the approval of the Commission if they obtain the approval of the Virginia Corporation Commission (Br., p. 127, n. 36). Thus they conclude that Section 11 should be construed to permit the retention of any property which may be acquired under Sections 8 and 9. But the argument proves too much. The broad exemptions for state-approved acquisitions of utility assets are applicable in terms independently of whether the newly acquired assets meet any of the specific standards of Section 11. Thus even though it were clear that a gas system could not meet the (A) standard, Sections 8 and 9 would not prohibit its acquisition. The broad exemption provisions of Sections 8 and 9 are thus of no assistance in construing Clause (A) of Section 11.

the same system,[12] and of course Engineers' proof was thoroughly inadequate to meeting even a less strict standard.

Petitioner argues that the retainability of the Gulf gas properties with the Gulf electric properties is before the Court. An examination of the Commission's opinion and order will show that the order is not predicated on the assumption that the Gulf electric property will be retained and that only an advisory opinion has been rendered on that assumption (see pp. 24 *et seq.*, *infra* and Appendix, *infra*). Nevertheless, if that matter is properly before this Court, it is clear that the Commission's advisory opinion is amply justified.

[12] In the court below Engineers argued that a gas system which could not operate independently without the loss of substantial economies was not a single integrated system within the definitions of Section 2 (a) (29) of the Act. This construction, however, misconceives the statute. Even a small isolated operating unit incapable of inter-connection with any other operating units and which would be unable to stand on its own feet may be a single integrated system within the contemplation of the statute. Thus in the case of the properties at Van Horn, Texas, serving only 400 people in an isolated community and clearly incapable of independent operation, the Commission found that those properties constituted a single integrated system (R. 145-146) and because of their dependence on El Paso were retainable with that property.

The function of the definition of "integrated system" is primarily, as auxiliary to the standards of Section 11 (b) (1), to afford a standard for the removal of obstacles which holding-company control places in the way of a rational and efficient integration of operating properties. The main thrust of the definition is against retention of properties too large or too scattered for efficient or coordinated opera-

The testimony with respect to Gulf comes no closer to meeting the statutory standards of Clause (A) than the testimony offered with respect to Virginia Gas. No different type of proof was offered in the case of Gulf respecting either the nature or the amount of assumed increased expenses on separation. Gulf Gas, though somewhat smaller than Virginia, is of sufficient size to be capable of self-management. Its 1940 gross assets were over $1,675,000. Its operating revenues for that year were over $638,000 and its gross income over $160,000. Engineers' evidence of increased expenses purported to show a total amount of $94,474 of which $52,450 was attributed to the

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tion. As applied to smaller properties the requirements of the definition would preclude the retention of an operating unit capable of more efficient and coordinated operations together with adjoining properties not in the holding-company system, but inefficient and uneconomical as operated under existing holding-company control. An example of a situation not retainable for that reason is the properties owned by Gulf at Alvin, Texas, which were completely surrounded by other utility systems and held not retainable (R. 134–136). However, where removal of holding-company control deprives the property of any possible nexus with other operating properties, the issue is whether it is capable of standing on its own feet without material loss of efficiency. This was the issue in the case of the Virginia gas properties since they were located in Norfolk and not adjacent to any other gas operations. There was no question of their being part of a system including other gas operations not owned by Virginia. If they were not capable of standing on their own feet financially as in the case of the Van Horn properties they would have been retainable, but as an additional system, not as part of the Virginia Electric System.

independent electric system. Since the latter amount would involve an increase of less than 1% in operating expenses of the electric system, the Commission stated it could not be regarded as substantial (R. 131–132). In the case of the gas system the asserted increased expenses were $42,024. The Commission indicated that this figure was subject to such substantial discount by reason of overstatements and failure to take into account countervailing advantages of freedom to compete that no finding of compliance with clause (A) could be based on it.[13]

4. The Nature of the Commission's Order Under Review as Bearing on Possible Mootness of the "Other Business" Issue

Engineers does not discuss the possibility that divestment of Virginia traction properties sub-

[13] Engineers speak of "admitted annual savings" of $25,000 (Br., p. 129, n. 34, p. 119). No such amount was ever found by the Commission and it contented itself with the finding that the estimates were very much overstated (R. 132–34) and failed to consider countervailing advantages. The figure of $25,000 is apparently taken from requested findings by the Commission's counsel before the Commission and represents an argument to the Commission not accepted by it. Further examination of the brief containing the figure shows that the contention of Commission counsel was that $19,000 was a maximum and that throwing in $6,000 extra "for good measure" would not affect the conclusion. See Requested Findings and Brief on Behalf of Counsel for the Public Utilities Division, pp. 98, 99, Unprinted Transcript, pp. 10879, 10880 (Doc. 65). Judge Soper in his dissenting opinion apparently accepted the $25,000 figure (R. 1222).

sequent to the decision of the court below may have rendered moot the controversy over the construction and application of the "other business" provisions of Section 11 (b) (1). We refer the Court to the discussion of this point at pages 91–93 of our original brief. A difference of point of view on this question of mootness and on the extent of the other issues before this Court appears, however, to be implicit in Engineers' statements at various points in its brief regarding the effect of the Commission's order of September 16, 1942, which is the principal order under review here. (Eng. Br. pp. 7, 149. But cf. n. 30, pp. 114, 115.) In our opinion, Engineers' statements reflect a misconception of the effect of the order.

That order directed Engineers to dispose of all its assets other than the securities of Virginia and to dispose of properties owned or operated by it through Virginia other than electric properties, the electric appliance business, and an ice business. The order made no provision concerning what should be done in case Engineers exercised the opportunity given it to elect to retain Gulf States as its single system. The Commission's findings contained advisory opinions on this assumption but such opinions are not reflected in the order itself. Engineers argues in its brief (see, *e. g.*, p. 7) that "Said order also provided, in effect (R. 149),"[14] in the event that Engineers should be

[14] This reference is to the Commission's opinion and not to the order.

permitted to select Gulf States, rather than Virginia as its principal system, that Engineers should dispose of all properties owned or operated by it through Gulf States for the purpose of conducting any gas utility, gas appliance merchandising and jobbing, water and ice businesses (and, also, in such event, of all interest, direct or indirect, in Virginia, El Paso (Texas), and Epsco, Inc.)" While this is an accurate description of the Commission's opinion, the opinion was in this respect only advisory, and it is not a description of the order of September 16, 1942. To make clear the precise nature of that order of the Commission, which appears at R. 159–162, we are setting it forth in full in an Appendix to this brief. If we are right in our view of the order, the only contingencies in which the issues concerning the Gulf gas properties and its "other businesses" might be presently reviewable are those discussed at page 93 of our original brief.

In the light of the disposition of the traction properties which are considered in the opinion of the court below, the only problem relating to "other businesses" which may not be moot is the problem of the retainability of the Gulf water and ice properties with the Gulf electric system.[15] So

[15] Engineers' brief indicates that gas appliance business may be involved, but it is obvious that the retainability of the gas appliance business depends upon the retainability of the gas business.

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far as the ice business is concerned, it is a business which has been losing money and one from which the company has been attempting to withdraw. In fact, no argument was addressed to the court below on the ice business and it is obvious that no real argument can be made for its retention (R. 126–127). As to the water business, the only argument made for retainability besides the fact that there is some minor use of joint personnel and facilities was that some of the joint facilities are so physically interspersed with electric equipment that they could not be disposed of without scrapping electrical machinery. The Commission indicated, however, that this was not an obstacle to disposal since it was admitted that arrangements could be made by way of easements and it was shown that in fact petitioners had recently commenced negotiations for the sale of those properties. (R. 126.) In the case of these ice and water properties there are present not even the factors upon which the court below laid stress. Unlike the case of the transportation properties, there are no assumed benefits of historical association, and the alleged increased expenses on separation are distinctly minor. There are no claims of substantial losses in the case of disposition of the properties as there were in the case of the Virginia transportation properties. See note 10, *supra*. In the light of these facts the standards set forth in the opinion of the court below will not

be of substantial assistance to the Commission in reexamining, if that should be necessary, whether the water properties are retainable under the standards of the "other business" clauses. An examination of the Commission's findings (R. 124-127) indicates that it was unimpressed with Engineers' argument that there were no material considerations from the point of view of investors or consumers which would warrant the Commission in permitting the retention of the properties. Thus, even if it had deemed it appropriate to look only to the last half of the second "other business" provision and to treat the "reasonably incidental" language as not mandatory, its decision would have been the same. If, however, this Court should reach the question of the correct interpretation of the "other business" provisions and disagree with the Commission's construction, then it would seem necessary that some further formulation be given to the standards which are to be applicable.

Thus it would be desirable to make clear that if the Commission is authorized to permit the retention of unrelated nonutility properties it is nevertheless not circumscribed in its application of public-interest standards so as to exclude any reference to the declared policy of Section 1 to eliminate the evils existing when "The growth and extension of holding companies bears no relation to . . . the integration and coordination of

related operating properties." See the discussion in our main brief, pp. 111 to 117.

Respectfully submitted.

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NOVEMBER 1945.

APPENDIX

Securities and Exchange Commission's Order of September 16, 1942 (R. 159–162)

United States of America

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 16th day of September A. D. 1942

In the Matter of Engineers Public Service Company and Its Subsidiary Companies, Respondents

File No. 59–4.—Public Utility Holding Company Act of 1935—Section 11 (b) (1)

ORDER REQUIRING DIVESTITURE BY HOLDING COMPANIES AND SUBSIDIARIES IN HOLDING COMPANY SYSTEM OF COMPANIES AND PROPERTIES OWNED OR OPERATED THEREBY

The Commission having on February 28, 1940, by notice and order for hearing, instituted proceedings under Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 with respect to Engineers Public Service Company and its subsidiaries to determine their status under that Section, and Engineers Public Service Com-

pany and its subsidiaries having answered such notice and order; and

Hearings having been held after due notice, requests for findings of fact on behalf of such companies and briefs in support thereof having been filed, oral argument having been heard; and

The Commission being advised in the premises, and having this day issued its Findings and Opinion with respect to certain action which the Commission finds necessary to limit the operations of the holding company systems of Engineers Public Service Company and its subsidiaries, including each subsidiary thereof which is a registered holding company and its subsidiaries, to a single integrated public utility system and additional systems and other businesses in accordance with the requirements of Section 11 (b) (1) of the Public Utility Holding Company Act of 1935;

It is ordered, pursuant to Section 11 (b) (1):

1. That Engineers Public Service Company, a registered public utility holding company, shall sever its relationship with the companies named hereafter by disposing or causing the disposition, in any appropriate manner not in contravention of the applicable provisions of the said Act or the Rules, Regulations or Orders promulgated thereunder, of its direct and indirect ownership, control and holding of securities issued and properties owned, controlled or operated by the following companies:

Savannah Electric and Power Company
Gulf States Utilities Company
Baton Rouge Bus Company, Inc.
El Paso Electric Company (Delaware)

El Paso Electric Company (Texas)
El Paso and Juarez Traction Company
El Paso Natural Gas Company
Engineers Public Service Company, Inc.; and

2. That the said Engineers Public Service Company shall cease to own or operate, directly or indirectly, any property or facilities now owned or operated by it through Virginia Electric and Power Company for the purpose of conducting, directly or indirectly, any gas utility, gas appliance merchandising and jobbing, and transportation business, and to cease engaging, directly or indirectly, in any gas utility, gas appliance merchandising and jobbing, and transportation business now engaged in by it, directly or indirectly, through the said Virginia Electric and Power Company; and

3. That El Paso Electric Company (Delaware), a registered public utility holding company, shall sever its relationship with El Paso and Juarez Traction Company by disposing or causing the disposition, in any appropriate manner not in contravention of the applicable provisions of the said Act or the Rules, Regulations or Orders promulgated thereunder, of its direct and indirect ownership, control and holding of securities issued and properties owned, controlled or operated by the said El Paso and Juarez Traction Company; and

4. That the said El Paso Electric Company (Delaware) shall cease to own or operate, directly or indirectly, any property or facilities now owned or operated by it through El Paso Electric Company (Texas) for the purpose of conducting, di-

rectly or indirectly, any transportation or toll bridge business, and to cease engaging, directly or indirectly, in any transportation and toll bridge business now engaged in by it, directly or indirectly, through the said El Paso Electric Company (Texas); and

Engineers Public Service Company, a registered public utility holding company, controlling more than one single integrated public utility system, although heretofore afforded opportunity to indicate its choice of the single integrated system it desires to retain as its principal system, having failed to avail itself of such opportunity, and the Commission desiring nevertheless that further opportunity be afforded said respondent to indicate its views with respect to its choice of the principal system;

It is further ordered that notwithstanding the provisions of Rule XII (d) of the Commission's Rules of Practice Engineers Public Service Company may, within fifteen days of the date hereof, petition for leave to retain as its principal system the electric utility system of Gulf States Utilities Company;

Provided, however, that the Commission reserves the right to grant, deny, or dispose of any such petition according to the merits of the grounds urged in support thereof, and to take such other action with respect thereto as may appear to the Commission to be appropriate.

Issue having arisen in this proceeding as to the permissibility of retention of the Gulf States Utilities Company's electric utility properties located in Jasper, Texas; and

The Commission deeming it necessary and appropriate that the record be reopened and that additional opportunity be afforded for the presentation of further relevant evidence bearing on such questions;

It is ordered that, at such hour and place and before such trial examiner as the Commission shall by further notice and order designate, additional opportunity shall be afforded upon application by Gulf States Utilities Company or Engineers Public Service Company for the presentation of further relevant evidence bearing upon the question whether the said electric utility properties located in Jasper, Texas, may be retained under Clauses (A) and (C) of Section 11 (b) (1) of the Act as systems additional to the integrated electric utility system of Gulf States Utilities Company.

It is provided, with respect to our Findings, Opinion and Order herein, in their entirety, and with respect to the entry, publication, and service thereof that they shall be without prejudice to the right of the Commission to enter such other and further appropriate orders from time to time as the Commission may deem necessary to secure compliance by the respondents with the provisions of the Act and the pertinent Rules and Regulations thereunder, the Findings and Opinion in this proceeding, and the provisions of this Order; and

It is further provided that jurisdiction is reserved to the Commission, notwithstanding this Order, or its entry, publication, and service, to conduct such investigations, hearings, or other proceedings involving any or all of the respond-

ents herein and to make such orders as it shall deem necessary or appropriate under Section 11 (b) (2) or any other provision of the Public Utility Holding Company Act of 1935.

By the Commission.

[SEAL] ORVAL L. DUBOIS,
Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1940